

COMMISSIONER
TEL. NO. 802-244-8718
FAX NO. 802-241-5377

DIRECTOR
VERMONT STATE POLICE
TEL. NO. 802-244-7345
FAX NO. 802-241-5551

DIRECTOR
CRIMINAL JUSTICE SERVICES
TEL. NO. 802-244-8786
FAX NO. 802-241-5557

DIRECTOR
VERMONT EMERGENCY MANAGEMENT
TEL. NO. 802-244-8721
FAX NO. 802-241-5556



STATE OF VERMONT
DEPARTMENT OF PUBLIC SAFETY
103 SOUTH MAIN STREET
WATERBURY, VERMONT 05671-2101
www.dps.state.vt.us

ADMINISTRATIVE SERVICES
TEL. NO. 802-244-8763
FAX NO. 802-241-5553

INTERNAL AFFAIRS
TEL. NO. 802-244-5194
FAX NO. 802-241-5377

LEGAL COUNSEL
TEL. NO. 802-244-6941
FAX NO. 802-241-5377

April 3, 2012

Legislative Committee on Administrative Rules
Vermont State House
Montpelier, VT 05633

Dear Representative Richard J. Marek;

This letter is being submitted to fulfill the requirement for submitting an explanation of comments and changes made to the rules governing the Vermont Therapeutic use of Cannabis Program.

A public hearing was conducted on March 23, 2012. The Department of Public Safety did not receive any comments at this meeting other than the comments received via mail from the Marijuana Policy Project. Two members from the public attended this public meeting. The meeting was consumed in a discussion about these written comments. Other than the comments from the marijuana policy project we received one other comment and the response to the comment is contained in section 6.28. T

The comments and the Departments "response" are contained below.

1) 2.2.7

~~A registered patient may not use marijuana while operating or a passenger in a motor vehicle, boat, or vessel, or any other vehicle propelled or drawn by power other than muscular power. Marijuana, while transported in a vehicle, boat, or vessel or any other vehicle propelled or drawn by power, shall be located in a locked container.~~

Reasoning:

Vermont statutes and other proposed rules already prohibit patients from "operating a motor vehicle, boat, or vessel, or any other vehicle propelled or drawn by power other than muscular power" while they are under the influence and smoking marijuana while in

public, including while on a “school bus, bus, or other public vehicle.”¹ Further, Vermont statutes and proposed rule 2.2.6 specify that patients and caregivers can only transport marijuana in public if it is in a locked container.² The language of 2.2.7 does not track the statutes’ language. Instead, it goes further than statutes and infringes on patients’ ability to travel and use their medicine. Proposed rule 2.2.7 would prohibit a patient who is a passenger in a vehicle — or even on a houseboat — from administering medical marijuana even if they use smokeless methods such as a brownie or tincture. Patients travel and they should not be prohibited from using their medicine when doing so would not endanger others.

Response:

Reject this language change.

It is necessary to retain this language as a vehicle is not considered public. Law enforcement needs the ability to develop probable cause for determining if a person is under the influence and may not be able to do so if marijuana is being smoked within a vehicle, vessel, etc.

2) 4.10

Patient cultivation of marijuana. A registered patient who elects to cultivate marijuana plants must keep the plants in a single secure indoor facility unless the plants are being transported to a new secure indoor facility because the registered patient is moving or the patient is transferring the plants to his or her registered caregiver after designating a caregiver to cultivate for the registered patient.

Reasoning:

It should be clear that a patient is allowed to move and to switch from growing for him or herself to having a caregiver, after notifying the department. Like everyone else, people with serious health conditions sometimes need to move. In addition, some patients with degenerating conditions may no longer be able to care for plants as their conditions worsen, and they may need to designate a caregiver at that point. It would be practical, logical, and compassionate to allow the plants that had been grown by the patient to be able to be transferred to the caregiver.

Response:

Reject this language change.

This language is taken directly from T. 4474c(c). The Department of Public Safety believes it has no discretion in this incidence to change the intent and meaning of the statute.

3) 5.9

Caregiver cultivation of marijuana. A caregiver who has been designated by a registered patient to cultivate marijuana for the patient's use must keep all plants in a

¹ 18 V.S.A. § 4474c (a)(1)(A), (a)(3); proposed rules 2.2.1.1 and 2.2.3.

² 18 V.S.A. § 4474c (d) “A registered patient or registered caregiver may not transport marijuana in public unless it is secured in a locked container.”

single secure indoor facility unless the plants are being transported to a new secure indoor facility because the caregiver is moving or the caregiver is transferring the plants to his or her patient, if the patient has advised the department that the patient will begin to cultivate marijuana him or herself.

Reasoning:

It should be clear that a caregiver is allowed to move and that a patient may switch from having a caregiver to cultivating for himself or herself, after notifying the department. Some patients may initially not be able to grow for a number of reasons, including if it is forbidden by their landlords, but may later be able to do so. It would be practical, logical, and compassionate to allow the plants that had been grown by the caregiver to be able to be transferred to the patient in such an instance, rather than having them destroyed.

Response:

Reject this language change.

This language is taken directly from T. 4474c(c). The Department of Public Safety believes it has not discretion in this incidence to change the intent and meaning of the statute.

4) 6.1.4.1, Measure 6

Measure 6: The applicant shall provide a list of all persons or business entities having direct or indirect authority over the management or policies of the dispensary, and a list of all persons or business entities having 5% or more ownership in the dispensary; ~~whether or not the interest is in the land or buildings, including owners of any business entity which owns all or part of the land or building.~~ [no points assigned]

Reasoning:

It can be extremely difficult for a dispensary to find a landlord that will rent to it, particularly after two threatening sets of letters were sent to landlords of dispensaries in California about possible property forfeiture. This requirement could make it more difficult to find willing landlords by tying them to the dispensary in records with the state.

Response:

Reject this language change.

The Department of Public Safety does not believe this creates an undue burden on a registered dispensary or the application process. The test in this rule is if the landlord has an ownership right (5%) in the dispensary and if so the department wants to know all parties that are involved in ownership.

5) 6.7

Opening of a dispensary. Except as provided in this rule, a A dispensary must be open and dispensing marijuana within six (6) months of receiving a registration certificate. A three (3) month waiver giving an extra three (3) months to open may be received from the department upon a written request showing why the ~~dispensaries~~ **dispensary's** opening will be delayed. **Additional three (3) month waivers may be granted if the dispensary demonstrates reasons beyond its control for the delay and that an additional delay would be in the best interest of patients.** A dispensary that does not open within these time lines shall forfeit their registration fee. **If a dispensary fails to open in the required time line, the department shall begin an application process for a replacement dispensary.**

Reasoning:

It is possible that there could be delays for which the dispensary is not to blame such as a natural disaster destroying or damaging the location. In some cases, the planned dispensary may still be able to serve patients sooner than they could be served if a new application process started. In addition, if one dispensary forfeits its registration, it is vital that a new one be able to open.

Response:

Reject this language change in part. Accept spelling change and last sentence.

It is the Department of Public Safety's intent to encourage and mandate that a dispensary be open for the benefit of the patient's. Therefore a 9 month window of time to open a dispensary has been determined to be reasonable. The department will accept the spelling change, dispensaries to dispensary's. The last section is already part of current law T. 18 Section 4474f(b) and will be added to the rules

6) 6.12.6

~~Communicate only with registered patients and registered caregivers that have designated the dispensary. This communication shall be through electronic means, U.S. mail or voice means as long as the registered patient or caregiver has agreed to such communication. This agreement shall be in writing and may be withdrawn by the registered patient or registered caregiver at any time. A dispensary may communicate with other registered patients or registered caregivers in the same manner as long as they have received written notice that is acceptable to do so. A dispensary shall develop procedures to accept and retain this "opt in" agreement and shall develop procedures to stop, "opt out", of communications when told to do so.~~

Reasoning:

This proposed rule is overly restrictive. If this is read strictly, it could make it practically impossible for a dispensary to function. A patient can only be served at a dispensary after making an appointment. Strictly speaking, even making the appointment and answering the patient's call would be communication prior to having gotten written consent.

Response:

Reject this language change.

It is the intent of the department to make this restrictive to protect the confidentiality of the patient. The authority given the department to make rules relative to communicating with patients is contained in T. 18 Sec. 4474f(a)(1)(F) which states “The medium and manner in which a dispensary may notify registered patients of its services.” Also the by appointment only provision is mandated in T. 18 Sec. 4474e(d)(2)

7) 6.25.8

~~**Record of current patients.** The registered dispensary must keep on file and available for department inspection, upon request, a copy of each current patient’s registry identification card and a Vermont driver’s license or other state issued photo identification. Files must be updated upon receipt of department notifications of dispensary designation (See Section 6.15).~~

Reasoning:

This is contrary to the language of Vermont law. Each patient will have designated the dispensary with the department already. All dispensary records must be kept by patient number, *not name*,³ but this would require the dispensary to have the patient’s name and other personally identifying information on-hand. In addition, this is unnecessary because the department will already have a list of which patient designates which dispensary, since the patient does so via the department.

Response:

Accept this language change in part.

The department agrees to delete “a copy of each current patient’s registry identification card and a Vermont driver’s license or other state-issued photo identification” and insert “registration number”. However, the language in the rule is needed for audit purposes as described in T. 18 Sec 4474e (d) and T. 18 Sec 4474f(a)(2).

8) 6.25.9

Hours of Operation. A dispensary may establish ~~their~~ **its** own hours of operation as long as those hours of operation are by appointment and in the best interest of a registered patient. ~~At no time may a dispensary schedule appointments such that more than one patient is at the dispensary at a time.~~

Reasoning:

This last sentence is not in the law and is not in the best interests of the patient or dispensary. There will only be four dispensaries statewide. Imagine if patients carpool,

³ 18 V.S.A. § 4474e. (d)

which would be better for the environment and save patients money on gas. Would one patient have to wait in a car, perhaps in the bitter cold or with the car idling? The one-patient at a time provision is not necessary for security, given that it is an appointment-only business, and is too restrictive.

Response:

Reject this language change except for the grammatical change from “their” to “it’s”.

The hours of operation are by appointment provision is in keeping with T. 18 Sec. (d) (2) which states a registered patient or registered caregiver may obtain marijuana from a dispensary by appointment only. The department believes that under the provisions of Section 4474f (a)(1)(B) which states, “Minimum oversight requirements for a dispensary” it has the authority to establish this rule. Other sections of the address the need for confidentiality of patients and caregivers and therefore, having patients or caregivers lined up to receive their marijuana potentially violates the confidentiality provisions of other sections. Specifically, T. 18 Sec 4474(a)(2) states the department of public safety shall adopt such rules with the goal of protecting against diversion and theft without imposing an undue burden on a registered dispensary or compromising the confidentiality of registered patients and their registered caregivers.

9) 6.26.1

A registered dispensary may not possess at any one time more than 28 mature marijuana plants, 98 immature marijuana plants, and 28 ounces of useable marijuana **unless the registered dispensary has been designated by more than 14 registered patients.** ~~However, if~~ If more than 14 registered patients designate a dispensary, the dispensary may cultivate and possess at any one time two mature marijuana plants, seven (7) immature marijuana plants and two ounces of useable marijuana for every registered patient for which the dispensary serves as the designated dispensary.

Reasoning:

The relevant statute is framed in a permissive manner, saying a dispensary may possess 28 mature marijuana plants, 98 immature marijuana plants, and 28 ounces of useable marijuana. This rule turned it into a negative, saying it could **not** possess more than that amount, without including the exception in the same sentence. This edit makes it clearer that the cap does not apply to dispensaries with more than 14 patients.

Response:

Accept this language change.

This is a grammatical change that does not change the intent of the rule or state law.

10) 6.26.8

~~A dispensary shall not communicate with a registered patient or registered caregiver unless they have received specific permission in writing to do so.~~ **Except as provided in this rule,** a dispensary shall not advertise through any means including electronic means or through social networks. **Except as provided in this rule,** a dispensary

dispensary shall not advertise any results of customer satisfaction surveys, their location of business or any information that would identify them as a marijuana dispensary. **This shall not prevent the creation of a website for the dispensary, listings in business directories or telephone books, or listings in trade or medical print or online publications.**

Reasoning:

The first sentence is vague and impractical. It indicates a dispensary staffer cannot even talk to a patient if the patient wants to schedule an appointment unless the patient has first signed a written waiver. How could the dispensary even get that waiver signed without communicating about it first, either about the waiver or to set up the appointment where it can be signed? “Initiate communication” would be better, but is still overly restrictive and could impede the ability of patients and dispensaries to connect. While imposing reasonable advertising limits is wise, this restriction is too far reaching. Patients need a way to find that specific dispensaries exist, what part of the state they are in, what strains they offer, and other details before they designate them. It is important that rules at least allow listings in business directories, a website, and other internet listings to allow patients to find the dispensaries and find out basic information about what they provide.

Response:

Reject this language change.

This rule is designed to prevent the listing of a dispensary in any publication that what identify itself as a business. The department believes that is not appropriate to promote the locations where the dispensing and sale of marijuana occurs. This program is designed for registered patients of whom there is a defined market. There is no need to promote a dispensary beyond notifying registered patients of their whereabouts. The Department of Public Safety believes this rule meets the goal of helping to protect against diversion and theft without creating an *undue* burden on a registered dispensary.

The misspelling of dispensary will be corrected.

11) 6.27.2

~~During the first sixty (60) days after start-up, a registered dispensary may have fourteen (14) marijuana live plants and others in various stages of cultivation without having any registered patients in order to build initial inventory.~~ **Immediately upon receiving its registration, including prior to having any registered patients, a dispensary may cultivate up to 28 mature marijuana plants and 98 immature marijuana plants, and possess up to 28 ounces of usable marijuana.**

Reasoning:

This rule was contrary to the language of the law, which allows 28 mature plants, 98 immature plants, and 28 ounces of marijuana during start-up. That provision of the law is very important. In Maine, dispensaries have had problems with shortages because their law did not include a similar provision for an adequate start-up. If dispensaries had a limit of 14 plants in the first 60 days, patients would almost certainly suffer with no medicine for months. It takes about four months for a planted marijuana seed to turn into a plant that produces usable marijuana. Only one person or entity (a dispensary, caregiver, or

patient) can grow per patient, so patients should be allowed to wait to designate a dispensary until it actually has a supply and can serve them. Otherwise, they will have several months while their designated grower (the dispensary) has no marijuana to provide. There would also be little incentive for any individual patient to designate a dispensary while they wait the several months for marijuana to grow, which could make it hard or impossible for the dispensary to ever produce an adequate supply.

Response:

Accept this language change.

12) 6.28

Daily inventory. Prepared marijuana must be kept under double lock and inventoried daily ~~by two cardholders~~.

Reasoning:

Requiring two staffers at a business that could get three or fewer customers daily is overly onerous and will drive up costs. (If 360 patients designate a dispensary, there are four dispensaries designated with patients evenly distributed, and the patients go once per month to a dispensary, that would be only three customers daily.)

Response:

Accept this language change.

The Department of Public Safety also received one other public comment suggesting that the double lock provision of this rule was not appropriate and burdensome. The department's position is that it is not burdensome and is in keeping with the goal of protecting against diversion and theft.

13) 6.29

Dispensing inventory. Quantities of prepared marijuana must be weighed, logged in and signed out ~~by two cardholders~~ when dispensed.

Reasoning:

The requirement that two cardholders sign marijuana out is unduly burdensome, which the rules are not supposed to be. It will drive up costs if two staffers have to work on dispensing at all times, especially given that there are only about 450 patients in the entire state to support the operations of all four dispensaries. For a business that is appointment-only, this is also unnecessary.

Response:

Accept this language change.

The department believes this may impose an undue burden on a registered dispensary.

14) 6.30

Trip tickets. ~~Distributions~~ **Dispensary agents' distributions** of marijuana for use by a registered patient or a registered caregiver for use by a registered patient must be labeled with a trip ticket to identify the dispensary, the VMP patient unique identifier number, or the VMP caregiver unique identifier number, the product, the amount and form, the time and date of origin, and destination of the product. Transportation of marijuana away from a dispensary must be in a locked container.

Reasoning:

The current language could apply even to marijuana that is picked up by a patient or caregiver. A patient or caregiver is allowed to transport the marijuana and possess it even if he or she is not returning from a dispensary. This trip ticket is thus unnecessary for patients and caregivers and could lead to unwarranted questioning of patients who are transporting marijuana at a time other than when they are returning from a dispensary. It would also unnecessarily waste the time of dispensary staffers, thus possibly driving up costs.

Response:

Reject this language change.

This change imposes a new term in the rules. It is the intent of the rule to require a trip ticket remain on the marijuana package during transportation away from a dispensary. The trip ticket design is intended to reinforce the idea that proper packaging can ensure the secure transportation of a marijuana package between a dispensary and its destination.

15) 6.32

Quality control. If the department receives a complaint regarding the presence of mold, bacteria or another contaminant in marijuana produced by a registered dispensary, or if the department has reason to believe that the presence of mold, bacteria or another contaminant may jeopardize the health of a registered patient, the department may conduct an unannounced visit to the registered dispensary and may require the registered dispensary owner to **ensure that samples of marijuana are tested** ~~provide samples of the marijuana for testing.~~ **The department may specify what samples must be tested.** The registered dispensary shall bear the costs of any tests required by the department.

Reasoning:

The proposed rule is problematic for a number of reasons. First, nowhere in Vermont law does it say that labs are actually allowed to possess marijuana to test it for quality control, so their involvement would be a state crime. In addition, the current rule could be preempted because it requires the commission of a federal crime (requiring the dispensary to provide samples). In addition, this seems to envision the dispensary providing the marijuana to the department itself, which raises additional legal issues since it could involve the department committing the federal crime of possessing marijuana. Ideally, the rule would simply be deleted to avoid these issues. However, the change suggested above would be an improvement because it would allow the dispensary itself

to decide whether to test the marijuana itself, which would not require the commission of a new crime and thus should not be preempted.

Response:

Accept this language change.

The Department of Public Safety agrees with the reasoning of the marijuana policy project.

16) 6.36

Illegal activity reporting. Any suspected violations of state law ~~Any suspected illegal activity~~ involving dispensary operations must be reported to law enforcement by the dispensary.

Reasoning:

The dispensary's core activity is a violation of federal law. Thus, this needs to only refer to state law violations.

Response:

Accept this concept and change the language as follows.

Change the rule language to by adding the following after dispensary;

except for violations of federal law pertaining to the dispensing or possession of marijuana.

The Department of Public Safety believes that law violations, except for those federal violations that are violated as a result of the State of Vermont's enabling legislation creating the dispensaries, should be reported to law enforcement.

Sincerely,

Francis (Paco) X. Aumand III
Director, Criminal Justice Services

Approved for Submission by: _____
Keith Flynn, Commissioner of Public Safety

